IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

IN RE: BROILER CHICKEN)
GROWER LITIGATION.)
_____)
HAFF POULTRY, INC., et al.,)
Plaintiffs,)
vs.) Case No. 6:20-MD-2977RJS-CMR
TYSON FOODS, INC., et al.,)
Defendants.)
_____)

BEFORE THE HONORABLE CECILIA M. ROMERO

January 7, 2022

Zoom Motion Hearing

A P P E A R A N C E S

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January 7, 2022

P R O C E E D I N G S

THE COURT: Good afternoon.

We're here in the Broiler Chicken Litigation, the antitrust litigation, case number 6:20-MJ-2977. We're here this afternoon on Pilgrim's Pride's motion for a protective order, document number 219.

I would like to go through and confirm who is all on the line. So who is present today on behalf of Pilgrim's Pride?

MR. ABBOTT: Good afternoon, Your Honor.

(Inaudible)

THE COURT: I'm sorry. Let me turn my volume up. I hear somebody trying to talk, but I can't quite hear you.

MR. BATES: I don't think it is your problem, Your Honor. I can't hear him either.

THE COURT: Okay. And then whoever is appearing, are you appearing by phone or by video?

MR. ABBOTT: Hi, Your Honor.

Is that better, everybody?

THE COURT: There we are.

MR. ABBOTT: Sorry. My audio source got switched on me without me realizing it. That is much better.

Good afternoon, Your Honor. Chris Abbott, Weil

Gotshal on behalf of Pilgrim's Pride. I'm joined by a few colleagues including Carrie Mahan, but I will be handling the argument this afternoon.

THE COURT: Thank you for that clarification.

Who is present on behalf of the plaintiff?

MR. SMITH: Your Honor, Gary Smith and Kyle Bates with Hausfeld on behalf of the plaintiffs. Mr. Bates will be handling the argument for plaintiffs.

THE COURT: All right.

MR. LAHMAN: Your Honor, I am Larry Lahman from Enid, Oklahoma. I am appearing solely because of the local rule requiring me to be present with those for whom I obtained pro hacs and I will be silent.

THE COURT: I'm sorry, Mr. Lahman. I didn't understand what you just said.

MR. LAHMAN: I am appearing because I obtained the pro hacs for several of the attorneys for the plaintiffs --

THE COURT: Okay.

MR. LAHMAN: -- which the local requires me to be present. I will be silent.

THE COURT: Thank you very much for that clarification. All right.

Do we have anyone present on behalf of Perdue?

MS. KOGER: Good afternoon, Your honor.

Kristin Koger of the law firm of Venable on behalf

of Perdue.

THE COURT: Thank you.

And is there anyone present on behalf of Sanderson Farms?

MS. SANTANIELLO: Yes, Your Honor. Lisa Santaniello from Kirkland & Ellis.

THE COURT: Thank you.

Is there anyone present on behalf of Tyson?

MR. JETHMALANI: Good afternoon, Your Honor. Kail Jethmalani from Axxin on behalf of the Tyson defendants.

THE COURT: Thank you.

With that I will ask -- I see there are a number of individuals on by phone which is fine. This is a public hearing and you're able to attend, but I need you all to mute your phones to make sure that we don't get any background noise. It does not appear that you have done that.

Is there anyone that I have missed, taking a roll call, that should or wants to make an appearance? All right.

Hearing nothing we will go ahead and get started.

I'm going to start by letting you all know that I have read the motion for a protective order and I have read the opposition and I have read the reply. I have also read a significant number of the cases that are cited, and I tell

you that so that you understand that I am ready to go and understand the issues before the Court today.

What I would like to do is to spend the time -- I have a number of questions that I would like to address with Pilgrim's Pride and some with the plaintiffs as well, but the majority with Pilgrim's Pride as I try to understand what they are asking the Court to do here today.

So I will start with my questions and then if you think there is something that I should know or that we have not discussed, I will give you an opportunity to inform the Court of that, recognizing that I have read all of the information that has been presented to me.

So with that, Mr. Abbott, I understand you're going to address the Court on behalf of Pilgrim's Pride. I want to start with a standing issue really. The overriding question and concern that I have as I read your motion and your reply, and then looking at the cases, is I have a concern that you don't have standing to seek the requested relief and, frankly, standing wasn't really addressed at all in your briefing.

I look at the Misner vs. Potter case and the Conroy versus Schafer case, which are Tenth Circuit cases, and you are correct that they establish the principle that the attorney-client privilege applies to confidential communications concerning matters within the scope of the

employee's corporate duties whether or not they are currently employed, but it seems to me that that issue is not exactly the issue that you're asking the Court to adjudicate.

As I understand it, Mr. Heatherly has an attorney. He was represented by counsel at the deposition. The Misner and Conroy cases don't really seem to answer the question of do you as corporate counsel have to be engaged by those former employees, and so those cases don't quite seem to be addressing the question before this Court, and so it is not clear that those are definitively dispositive to the issue that you're asking the Court to address.

That all gets me back to the underlying question of why do you have standing to address this issue and, more specifically, where was that briefed in your pleadings?

MR. ABBOTT: Thank you, Your Honor.

I think that Pilgrim's I think has standing here because to the extent that Mr. Heatherly would testify about the matters that Mr. Bates -- about the matters which Mr. Bates inquired about, which were very broad questions about the content of a conversation and the documents reviewed, that is Pilgrim's privilege. So to the extent that that privilege is impeded on by plaintiffs in this deposition if it were to be reopened, the harm would be to Pilgrim's. I guess that is number one.

And then number two is part of that which is that the burden and the expense of convening another deposition for the sole purpose of asking two questions which would impose on Pilgrim's privilege, that burden and expense would fall on of course Mr. Heatherly, but it would also fall on Pilgrim's. I think that the cases that we have cited have supported the proposition that the fact that the burden would fall on the defendant corporation is sufficient.

THE COURT: So with respect to the second point, you say that there is an undue burden to Pilgrim's, but then you don't really focus on what that undue burden is. Instead you look to Mr. Heatherly's situation and just sort of say it is not fair for us to have to take a second deposition, but there is case law within the Tenth Circuit that clearly establishes that certainly while it is not the norm to have to sit for a second deposition, where there is a good reason to have to sit for a second deposition it can be justified. And so your argument appears to be somewhat circular, which gets me to my second question, which is the concern that I have is that you cite to almost exclusively cases outside of the Tenth Circuit.

In fact, when I looked at your brief, the Misner versus Potter case was the only case within the Tenth Circuit that you cited to that would be controlling precedent. The others we could look to perhaps for some

persuasive value, but the reality is that you don't cite to anything within the Tenth Circuit. And so my first question is why are you citing to all of this case law outside of the Tenth Circuit to establish the concept that the attorney-client privilege and work product doctrines apply to the two questions that plaintiff is trying to get? That is the first part of the question.

The second part of the question is separate and apart from citing to cases outside of the Tenth Circuit that are not controlling, you don't ever really even tell me what the standard is that applies, which I think is significant because those are significant issues that you're asking the Court to rule on.

So when I look, for example, to the noncontrolling case that you cite from New Jersey, the Nicholls versus Philips case, that case even says when a party seeks a protective order on the grounds of the information sought is protected by the attorney-client privilege, that party has the burden of establishing the essential elements of the privilege, end quote.

I look at your brief and I say there is no standard set out for the Court for what privilege applies, which is significant, because when I look at a lot of your other cases, some of those cases are citing to state law on privilege. For example, I think the Hof versus LaPorte

case, which is an Eastern District case out of Louisiana, is looking at state law. So then I said, well, okay, what law applies, state or federal? I think it would be federal, because you're here on federal question jurisdiction as opposed to diversity jurisdiction, but that standard is not set out anywhere in your brief, and you're asking me to apply the privilege and say that it is an undue burden for both you and Mr. Heatherly, but the standard for me to know and have comfort what I need to apply to reach that conclusion appears to be lacking.

MR. ABBOTT: Okay. So in terms of Tenth Circuit law, Your Honor, we did not find controlling Tenth Circuit law, and so we did a survey and researched across the circuits up and down and tried to find kind of how other courts and other circuits have been handling this issue of the privilege as attributed to former employees.

THE COURT: Let me just interrupt you there, Mr. Abbott. Thank you for that clarification.

Going forward for all of you if you could make that clear, because we spent -- my clerk spent significant time trying to figure out why that was not addressed in your brief, and we assumed that that was the case, right, that with these particular circumstance there isn't anything within the Tenth Circuit.

But having said that, there is case law within the

Tenth Circuit on how privilege works, right, in general. Like what do you need to prove to show that there is an attorney-client privilege? And it seems to me that what you're asking the Court to do is to look at these New York -- mostly New York cases and say, well -- and Misner and the Conroy case, which support the general proposition that you can have a privileged communication with a former employee. I don't think in my reading of the plaintiff's briefs that anybody disagrees with that, right, but there is a bunch of caveats to sort of get to that point, right? In order for that concept to apply, don't I need to know that there was an engagement set up for the purpose of collecting information as part of the litigation process?

You might say, well, you could assume that because we're in a deposition but, as I understand it, he is not a controlling -- he is not a control person, right? I don't know if he was or not. That wasn't addressed in your brief. And it also seems to me that the concepts of a joint defense agreement, the common interest doctrine, wouldn't some of that or all of that have to be addressed in your brief in order for me to get to that end question and apply the Misner and Conroy concept?

MR. ABBOTT: So a couple of responses to that, Your Honor. First of all, I think it is nice that we do now agree I think with the plaintiffs that we are able to have

privileged conversations with former employees. That was not the position the plaintiffs took in the deposition. When I objected and instructed Mr. Heatherly not to answer, I stated the basis for that objection and I stated it very clearly, which was that I represent Pilgrim's Pride and I am entitled to have a privileged conversation with a former employee about his time at the company.

At the time the plaintiffs said -- Mr. Bates said I don't think I agree. Now, I think from the briefing that we have now reached a place where they are conceding that those types of privileged conversations are at least theoretically possible, but the exception that they are trying to articulate would swallow the rule. I think the rule that we are asking the Court to set out is the one that is articulated in Gary Friedrich and the progeny which is that conversations with former employees about, you know, facts related to their time at the company are privileged, and that there is also work product protection that would apply to those communications. But the --

THE COURT: So you're asking the Court to find that, but the caveat that I would put on that for what I am prepared to consider is that they could be privileged, right? I mean in the cases that you have cited there is nothing that applies a blanket privilege, right? It has to be in pursuit of collecting information as it relates to

litigation, right, or something at issue. I don't understand there to be a blanket privilege that any communications that you have as either inside counsel or outside counsel with former employees is protected.

Is that what you're saying?

MR. ABBOTT: No, that is not what we are saying.

THE COURT: Okay.

MR. ABBOTT: I am fully -- no. What we are saying is that conversations between counsel for a company and a former employee of that company that relate to, you know, conduct and facts that arose or that they are aware of because of their time at the company when done in the context of litigation like this one are privileged. And the plaintiffs, despite the fact that they are trying to articulate -- they say they are trying to articulate an exception to that rule, but they are really not. What they are doing is they are trying to articulate an exception that would completely swallow the rule.

What they are asking for, Your Honor, if you look at footnote one of their brief --

THE COURT: I understand what they are asking me to do and I have some questions for them about that, but what I would like you to give me guidance on is -- I have to say that I'm really uncomfortable from both of your arguments, both from their exception argument and the way

that you're asking me to rule, based on the fact that you're saying there is nothing in the Tenth Circuit that tells me that I can do this, right, and so it seems to me if -- well, you're telling me there is nothing in the Tenth Circuit in this particular way, but I'm saying, well, isn't there stuff in the Tenth Circuit where you could evaluate more closely what is the -- does there have to be an attorney-client relationship before the general concept that we were just discussing kicks in?

Do you know the answer to that, Mr. Abbott?

MR. ABBOTT: I don't sitting here looking at you today, Your Honor.

THE COURT: I think that question must be answered before you can ask me to do what you're asking me to do, because I read the Misner case and the Conroy case really closely, and I don't know if you all went back and looked at the briefing in those cases to make sure and clear up if there was an engagement, but as the plaintiffs rightly point out, in some of the cases that you have cited it is clear that there is an engagement. And here we have without dispute, as I understand it, Mr. Heatherly declining to have Pilgrim's Pride represent him and went out and got his own attorney. I have to say I really struggle with your ability to assert the right to a protective order for a privilege that I am not sure that you own because there is no

engagement.

MR. ABBOTT: Your Honor, setting aside the Tenth Circuit on that particular issue, I think Gary Friedrich is informative, because there in Gary Friedrich the court said, you know -- in Gary Friedrich the attorneys did represent the deponent, the former employee for purposes of the deposition, and the court set that aside. The court held in that case or found in that case that the mere kind of representation by the corporate counsel of the deponent for purposes of the deposition was not enough to establish the privilege, because there had to be an independent basis.

I'm looking at it on page 3, Your Honor. In the conclusory sentence it says, therefore, to the extent that counsel's communications with Mr. Thomas are protected by the attorney-client privilege that privilege belongs to Marble, the company.

So I hear you on the Tenth Circuit issue, and I apologize for not having more on that in the briefing, but I do think that at least the cases -- at least Gary Friedrich is informative on the issue that that distinction between an attorney representing -- corporate counsel representing an individual for purposes of the deposition and not, is not necessarily the turning point of the analysis.

THE COURT: Let me also ask you, you make an argument about the work product and the documents that were

reviewed, so the second question that they wanted to ask Mr. Heatherly. One of the points that they make is, look, we think -- we don't know for sure, because he was not allowed to answer that question, but we think some of the documents that he reviewed were documents that would have Bates numbers on them and were produced to other people. And if that is the case, then absolutely we're entitled to know what they are.

So that is the first point that I have. It seems to me that the law is consistent with that, right? Now you may come back and say, look, they could have asked more questions to people to figure that out and their response is, hey, you told us we couldn't ask those questions. We did what we could. That is the first question.

The second question is you cite to a New York line of cases, and I think there are like three or four of them, where you say, look, the work product doctrine can apply to discussions. It is not just documents and tangible things. We think that that would cover us having to produce those documents. I got to tell you that the Tenth Circuit seems pretty clear that that is not the case, right? I mean that the work product doctrine applies to documents and tangible things, and so my question to you is did you look in the Tenth Circuit for an answer to that question?

MR. ABBOTT: Yes, Your Honor, and we did not find

controlling --

THE COURT: Well, what I want to get clarification on is did you not confine -- did you not find controlling authority consistent with the New York cases? Is that what you didn't find, because it seems to me that it is pretty clear in the Tenth Circuit that it wouldn't apply to discussions. I am not aware of any cases where the work product doctrine was used to apply to discussions in the Tenth Circuit.

MR. ABBOTT: Your Honor, we did not find binding precedent on that issue in the Tenth Circuit.

THE COURT: And if there is no precedent in the Tenth Circuit that says the discussions that we had is work product, then isn't it true that if they said tell me every document that you recall reviewing he would have to answer that question?

MR. ABBOTT: I think, Your Honor, that without binding precedent I think it -- I think that work -- I think that the work product doctrine -- I'm sorry, Your Honor.

Your question is without binding precedent on the specific issue of whether --

THE COURT: Let me ask it differently.

MR. ABBOTT: I'm sorry, Your Honor.

THE COURT: There are no cases that I'm aware of, and you just told me that you couldn't find any cases

either, that say what the New York line of cases say when it comes to work product, which is work product can apply to communications, oral communications. Okay. If there is no precedent in the Tenth Circuit that says that, it seems to me then that the rule is unless one of those documents relates to a mental impression that you shared with Mr. Heatherly, right, that you wrote down, hey, this is the strategy that we're trying to work up, everything else would have to be disclosed.

Do I have that wrong?

MR. ABBOTT: No. I think, Your Honor -- I think what we're relying on is the principle in Hickman vs. Taylor, which is that the work product doctrine protects an attorney's ability to sift through and assemble information during a case. I mean there were 402,000 documents produced by Pilgrim's in this case. The plaintiffs have asked Mr. Heatherly to identify exactly which documents me and my team identified and asked him questions about. I think that the principle of Hickman is what protects that as work product, and regardless of -- you know, we were not able to find binding authority on that specific point, but I think that that is a justifiable position and principle based on Hickman.

THE COURT: But wouldn't it -- it seems to me that there are two ways. If I were to find that Hickman case to

be controlling, it seems to me that if they had asked tell me the manner in which you were shown these documents, yes -- right, because that would be the attorney compiling it, right, and showing it to Mr. Heatherly in a certain way. But as I understand it, that is not the question they are asking. They are just saying tell me what documents you reviewed that you can remember.

Now, they asked him, as I understand it, asked him at the end of the deposition to write down what he could remember today, so that if they came back he could have that clear, and he might say what I remember is I saw these five documents, right? Why is that privileged under the work product doctrine, because if those five documents were produced as part of the Bates numbers, why is that privileged?

MR. ABBOTT: Because, Your Honor, the sifting through and identifying of the documents would reveal attorney impressions and attorney thinking about the case. So there were 402,000 documents produced, right? If, Your Honor, they are able to get Mr. Heatherly to answer that question and say he says I remember this document, this document, this document and this document, the issues that those documents hit on, kind of the types of communications potentially and the types of documents that we think are either interesting or important for purposes of

understanding our defenses and the strength of the plaintiff's claims, what they are doing is not just asking for documents that -- you know, it is not just that they are documents that have been produced in this case. It is that the work that me and my team went through to distill those documents down into a discrete set would reveal what we think is important about this case. Now --

THE COURT: Let me interrupt you.

So the Hickman case, now that I have it up on my screen, is a Supreme Court case from 1974. It could still be good law absolutely, but there could still be some further nuances that been developed through the Tenth Circuit. Did you research any cases in the Tenth Circuit that cite to Hickman versus Taylor?

MR. ABBOTT: We did not cite to any in the brief that I know of, Your Honor.

THE COURT: Okay. Those are the only questions that I have for you, Mr. Abbott. You brought the motion so I will absolutely give you an opportunity to close.

Is there anything that you would like to say to the Court now, that you would like me to consider before I go to the plaintiffs and ask them some questions?

MR. ABBOTT: No, Your Honor.

Yes, Your Honor. I think the fundamental point that maybe is not duplicative of our briefing is really that

if you look at footnote one of their brief, they are not just asking to be able to ask about conversations. They are asking for the ability to ask questions about conversations -- every conversation that we had with Mr. Heatherly and really any former employee for the rest of this case, number one.

Number two, if you look at page 10, I think that the exception that they are asking this Court to draw would completely swallow the rule that we are asking the Court to articulate, and which we think has been articulated by the weight of courts in this county, which they are asking -- they are saying that these circumstances clearly indicate that Mr. Heatherly's conversations with counsel for Pilgrim's Pride had the potential to affect his testimony which is all that is required.

If that is the exception that they are asking this Court to adopt, then I am not sure that there is any conversation that any corporate counsel could have with any former employee for the rest of this case that wouldn't have the potential to affect their testimony.

THE COURT: Thank you, Mr. Abbott.

All right. Now I want to turn to the plaintiffs.

Mr. Bates, you're going to be addressing the Court, correct?

MR. BATES: Yes. Good afternoon, Your Honor.

THE COURT: Good afternoon.

I want to start first with the work product privilege doctrine and the argument that Mr. Abbott I think focused in on, which is Hickman versus Taylor suggests and supports the concept that the attorney sifting through and compiling documents and then showing them to Mr. Heatherly would be mental impressions and, therefore -- or legal strategy and, therefore, privileged. I want to know your response to that generally, but then specifically I want to know if you know about cases in the Tenth Circuit that would suggest something different.

MR. BATES: Absolutely, Your Honor.

The point that Your Honor made during your discussion with Mr. Abbott about when the Hickman case was decided is exactly the point. Your Honor is right that that is an old case and a lot has changed about complex litigation since that case was decided.

For example, amendments to Rule 26 which require parties to make initial disclosures. Prior to that amendment to Rule 26, those initial disclosures where parties identified witnesses who might have discoverable information and computations of damages and the locations documents, all of those things would be work product under the standard that Hickman articulates, but that is what parties do in litigation under the federal rules every day.

There have been other changes to complex litigation including the volume of documents that Mr. Abbott allowed to that are now commonplace in our federal system today.

So to apply that old standard to litigation today and to say that any document that counsel looks at or shows a witness before they have a meeting with that person, and the mere identity of that document would somehow invade Mr. Abbott's thoughts about the case is just vastly, vastly overbroad. There are many cases in the Tenth Circuit that address that question. We cite them in footnote seven of our opposition on page 13. All of those cases have consistently held that the selection of documents does not constitute protected work product.

THE COURT: And these are out of the Tenth Circuit, right? They are district court cases, but they are out of the Tenth Circuit. Is that correct?

MR. BATES: That is correct, Your Honor. They are all from the District of Kansas, which is where we found the bulk of the authority addressing this question today.

THE COURT: Logistically your opposition sometimes -- at times read as though you were -- that you sort of -- if I were to deny the plaintiff's motion would sort of mean that you get to do something. You're not asking me -- that is an odd way to say it, but that is kind of how I put it in my mind. You're not asking me -- when

your motion is just opposing the motion for a protective order, and you're not asking me, and in my mind it wouldn't be appropriate for you to be asking me for affirmative relief through your opposition. That is a weird way to say logistically if I deny the plaintiff's motion what does that mean for what happens next? Because it seems to me this issue is probably going to keep coming up, right, so we have got to figure it out. What does that mean practically?

MR. BATES: Let me start at the beginning, Your Honor. You're exactly right. We are not asking the Court for affirmative relief. We left Mr. Heatherly's deposition open because of his refusal to answer these questions. Pilgrim's Pride moved for a protective order preventing the resumption of our examination of Mr. Heatherly. So if Pilgrim's Pride's motion is denied, the plaintiffs will proceed to continue their examination of Mr. Heatherly.

To your last point about whether this issue will keep coming up, I think that the Court's decision on this issue will hopefully inform and deter Pilgrim's Pride's counsel from instructing future witnesses, including Mr. Heatherly, not to answer questions during their deposition.

THE COURT: Okay. All right.

Now what I want to do is I want to go to the attorney-client privilege issue. So the relief that Pilgrim's Pride is asking this Court for is under Rule 26,

right? They are saying give us a protective order for undue burden, oppression, and one of the bases for the Court to apply that concept is because the information is privileged under the attorney-client privilege issue. They cite a line of cases that say that communications with former employees can be privileged. I think, and this is the first part of a longer discussion I think, but I think you concede that point.

Am I wrong on that that communications with former employees can be privileged, but in this case you think they are not? Is that right? Do I have that right?

MR. BATES: That is right, Your Honor.

For example, I can think of a hypothetical situation in which while Mr. Heatherly was still employed with Pilgrim's Pride he was interviewed by Mr. Abbott. Then he since leaves the employment of Pilgrim's Pride and I examine him and I ask him about that conversation, and Pilgrim's Pride would object and they would say that that was a privileged conversation between a then current employee who is now a former employee and I think they would be right about that, but that is so far afield from this situation. Your Honor is correct that that is our position.

THE COURT: And your point to this is, look, this isn't that typical situation where a company reaches out to an employee, a former employee that is going to be deposed

and says, hey, we understand that you're going to be deposed. You have relevant information and we can represent you. We'll get you prepared for the deposition. You're saying, look, that is a separate situation from what we have here, and I think both sides agree that Mr. Heatherly, a nonparty, was represented by counsel and so what does that do to these concepts?

Mr. Abbott says we couldn't find anything in the Tenth Circuit that specifically addresses it so we went to New York, mostly New York. There are other cases, but mostly New York, and the New York cases seem to be factually probably the most similar, and you also look to New York cases for the exception that you're arguing.

So you say first, you know, we don't think that there is an engagement and, therefore, the privilege can't apply, but, secondarily, we think that there is an exception to that rule that conversations that bear on or otherwise potentially affect a witness's testimony defeat the privilege. You're looking at the Nicholls case and the Polatta case, one from New York and one from the District of Connecticut. I really struggle with both of you asking me to apply these concepts that are not in the Tenth Circuit.

Is that concept not in the Tenth Circuit?

MR. BATES: So, Your Honor, I would say that the rule about what happens in this very specific situation

where a former employee who is not represented by corporate counsel has a conversation with corporate counsel incident to their deposition, that specific situation does not exist in the law in the Tenth Circuit.

What does exist in the law in the Tenth Circuit, and this goes back to your discussion with Mr. Abbott about your discomfort with how Pilgrim's Pride is asking that law to be applied to this situation is the fact that the attorney-client privilege is a voluntary relationship between a client and an attorney, and there is lots of law in the Tenth Circuit about how the attorney-client relationship works.

What is strange about what Pilgrim's Pride is asking the Court to do in this situation, is Pilgrim's Pride is asking to use the attorney-client privilege offensively on its own behalf to reach out and protect the conversation it had with a separately represented third party. So even if the specifics of this situation are not addressed in the Tenth Circuit, that notion does not comport with the Tenth Circuit law on attorney-client privilege.

THE COURT: Because when there is an engagement -- so I as the client would engage an attorney and I own -- because I'm engaging the attorney, I own the right to the privilege, correct? And so if I want to waive that privilege as the client, I can do that?

MR. BATES: That is exactly right, Your Honor.

THE COURT: What I struggle with, Mr. Bates, is it seems to me that as I talked about with Mr. Abbott, sort of the general privilege principles need to be addressed here, which they were not, and perhaps this is an unfair question to ask you, and you may say you should ask him that, but I'm going to ask you anyway. If there was, for example, a joint defense or common interest, because it seems to me that there very well would be a common interest, although I'm not sure if that is the case based on -- I believe you said perhaps he was providing testimony sympathetic to your side. I don't know the answer to that. I mean don't I need to know if those are applicable here before I can decide this issue?

MR. BATES: So, Your Honor, I would say that yes, if Pilgrim's Pride were going to advance those arguments, it would be Pilgrim's burden to present you with that information and they did not. The reason they did not is because I asked those questions of Mr. Heatherly during his deposition and he unequivocally testified that there was no joint defense or common interest privilege and he answered all of those questions very clearly, and I am not a lawyer for Pilgrim's Pride, but that would be my guess as to why they didn't raise that argument.

THE COURT: Okay. Sorry. I'm just checking my

notes to make sure I have covered my questions.

MR. ABBOTT: Your Honor, if I may just add one point in response?

THE COURT: One second. I will give you the opportunity --

MR. ABBOTT: I'm sorry.

THE COURT: Yes. I will come back to you to give your final concluding remarks.

I think you have addressed all of my questions.

Mr. Bates, is there anything else that you would like to inform the Court of that we have not discussed?

MR. BATES: There is not, Your Honor.

THE COURT: Thank you.

Mr. Abbott.

MR. ABBOTT: Thank you, Your Honor.

I just wanted to chime in with one additional point, which is that the point on the engagement from our perspective is that the weight -- while there aren't cases in the Tenth Circuit that go to that specific issue, the weight of the cases elsewhere hold that the privilege that applies -- the conversation between corporate counsel and former employees belongs to the corporation, which I wanted to raise in the context of the waiver conversation, because here Mr. Heatherly cannot waive Pilgrim's privilege, but he can testify about conversations -- about conversations that

I had with him, and so what we're trying to do is assert Pilgrim's privilege. It is not offensive. It is defensive. I wanted to make sure that that position is clear.

THE COURT: Thank you, Mr. Abbott.

The other issue that I would like you to address is in response on the work product, and you cite to the Hickman case, which we talked about is a 1943 case, and Mr. Bates has a footnote rightly included in his brief, footnote seven, where he cites a plethora of district court cases out of the Tenth Circuit that confirm that disclosure of the documents would not disclose the mental processes. I did not see any cases out of Oklahoma, but there are many of them out of Kansas. I am wondering, did you look at any cases in Oklahoma that would reach a contrary result other than the one cited in footnote seven?

MR. ABBOTT: So we have -- I don't have any cases that I can give you right now that reach a contrary result, but I do have all of the distinguishing factors of the cases and the numerous distinguishing factors in the cases cited in footnote seven. There were cases in there that related to refreshed recollection, for example, you know, that counsel did not lay a foundation for refreshed recollection and there were cases about privilege logs. I think that the cases were not on point.

THE COURT: All right. Anything more, Mr. Abbott?

MR. ABBOTT: No.

THE COURT: Thank you.

I am going to take a brief recess and then I will come back on. I'm going to stop the recording. If I come back on and I don't push start, please somebody interrupt me to make sure I do push start. So if you could all just hold on the line.

(Recess)

THE COURT: Thank you.

We're back on the record and the Court is prepared to issue its rulings. Before I start I do want to let both parties know that I appreciate your professionalism today and coming prepared to address these issues, which you all concede perhaps are a little novel, and then also to thank you for the quality and caliber of your briefs. They were well written, well organized and easy to follow and had good case law cited, other than it was not the Tenth Circuit, but we do appreciate that because it makes our job much easier. My clerk in particular wanted me to tell you both that. Thank you. With that the Court is prepared to issue its ruling.

Rule 26(e) confers broad discretion -- sorry. I am jumping ahead.

The standard that applies is under Federal Rule of Civil Procedure 26(c)(1) which states that the Court may for

good cause issue a protective order to a party or person from annoyance, embarrassment, oppression or undue burden or expense. Rule 26(c) confers broad discretion on the Court to decide when a protective order is appropriate and what degree of protection is required. That comes from Siegel versus Blue Giant Equipment Corp, 793F, Appendix 737, a Tenth Circuit case from 2019.

Applying this standard, the Court denies the motion as Pilgrim's Pride has failed to meet the standard. Pilgrim's Pride is asking this Court to grant a protective order based on claims that the information sought is covered by the attorney-client privilege and work product doctrines for a former employee it does not represent and who did not join the motion. They also argue it is an undue burden to require Mr. Heatherly and Pilgrim's Pride to sit for another deposition.

With respect to the attorney-client privilege, Pilgrim's Pride has failed to address why it has standing in such a situation. At the hearing they proffered that they own the privilege, but that issue was not briefed and addressed in the brief sufficient that the Court is comfortable to issue a ruling on it.

Moreover, it has failed to set out or discuss in any material way the elements of privilege as set forth in Hoog versus PetroQuest Energy, 2021 WestLaw 3291793, Eastern

District of Oklahoma case from August of 2021. It is Pilgrim's burden to show good cause as to why the discovery should not be permitted. They have failed to meet that standard. It is not clear, for example, if state or federal law would apply to the privilege, and assuming federal law would apply, Pilgrim's failed to address the applicable standard within the Tenth Circuit. Rather it cites to cases outside of New York which are not controlling.

Now, today Pilgrim's has asserted that there is not any factually controlling cases in the Tenth Circuit, but separate and apart from that, there is case law within the Tenth Circuit to discuss the attorney-client privilege standard and that was not addressed. So with respect to that argument the Court is denying it.

I do want to clarify, however, that the Court is not ruling today that the privilege does not apply, only that Pilgrim's has failed to fully and accurately address the Rule 26(c) standard, which I know the parties were hoping for more clarity on, but I don't have the information that I need to find whether or not the privilege applies.

With respect to the argument that the work product privilege applies to communications as opposed to just documents or tangible things that are prepared in anticipation of litigation as set out in Rule of Civil Procedure 26(e)(3)(a), Pilgrim's Pride cites two cases that

are not controlling to support that position. For example, they cite to a number of cases out of New York and the Court is not inclined to follow those cases.

In addition, they cite to the Hicks case, which is a Supreme Court case, but it is fairly dated, and they fail to rebut the cases cited in plaintiff's brief at footnote seven out of the Tenth Circuit that are district court cases that clearly establish that disclosure of documents that are being requested would not disclose the mental process of counsel.

Finally, addressing the argument that there is an undue burden on Mr. Heatherly and Pilgrim's Pride to have to sit for a second deposition, Pilgrim's has failed to meet the standard of showing undue burden. Pilgrim's argues that because Mr. Heatherly is a retiree who is a nonparty to this suit, who is suffering from an unidentified medical issue, that sitting for a second deposition outweighs its likely benefit.

At this point the Court disagrees. Assuming that it is appropriate for Pilgrim's Pride to make such an argument regarding the former employee who it does not represent and, importantly, who has not made that argument for himself, and as the Court has just discussed, it is not clear that Pilgrim's Pride has the right to make that argument, no specific medical information was submitted to

justify the bald claim that such an unidentified medical condition would impact Mr. Heatherly in a significant way.

With respect to the argument that Pilgrim's Pride should not have to sit because of the burden and expense, those are the only reasons that were proffered and as set out in Sentry Insurance vs. Shivers, 164 F.R.D. 255, a District of Kansas case from 1996, bald assertions of emotional and financial stress do not suffice, end quote.

Pilgrim's also made, somewhat, the point that it was just inherently unfair to have to sit for a second deposition, and while the Court would agree that certainly it is not the norm to have to sit for a second deposition, the law is clear that unless there is a showing of a need or some good reason to do so, that it is not common to sit for a second deposition.

Here, because it is not clear that the privilege applies, the Court is not able to find that there is an undue burden based on that reason offered.

For these reasons the motion for the protective order is denied.

Now, having said that, it is clear that this issue is going to come back, and I don't know if it is going to come back by way of a renewed motion for a protective order or a motion to compel. When it comes back I want to give you some guidance on what it is that I need to help us all

figure out this issue.

Mr. Abbott has said, and I think Mr. Bates concedes because they didn't include any cases, as far as I can recall, that there are no factually similar cases within the Tenth Circuit, and that there perhaps may be factually similar cases outside of the Tenth Circuit, namely the Nicholls case and that line of cases.

Before we get to those cases, though, I need to know, number one, what the general standard is within the Tenth Circuit when it comes to attorney-client privilege, right, just the general standard that we all know. I think we start there.

Then to the extent that you can drill down, I think really the question that we need answered is with respect to former employees, does there need to be an engagement, which we know was not done here, a joint defense agreement, a common interest or some other concept to apply or not to find the privilege applies.

Now, I know you all attempted to do that in your briefs, but you focused on cases outside of our jurisdiction. Mr. Abbott said maybe some were looked at within and maybe some were not, but I need to have certainty what the Tenth Circuit says so that it is clear why it would be appropriate for me to look at New York or perhaps some other place, right? So that is what I am looking at.

The other thing, and I hope this does not lead you astray too much, but in processing this issue I was thinking about the UpJohn case and the UpJohn warning that you give to clients. For example, when you would go in and you would be seeking information -- not clients -- that you would give to individuals that you were interviewing.

When you go in and you are talking to, for example, a former employee about something that happened that has now resulted in litigation, the UpJohn warning says that you have to make it clear if you represent that person or not, right? And if you don't represent that person, then I think the answer is that communication is discoverable. If you do represent that person, it is not. And it seems to me that that line of cases perhaps could be helpful in this situation, although I don't know for sure, but perhaps it is the common interest doctrine that would apply.

I basically just need you to dig a little bit more on the law and give me a little more certainly of which way I'm supposed to go, and if you want me follow New York, why that is justified in this circumstance.

Do you have any questions? Let's start with Mr. Abbott.

MR. ABBOTT: No questions, Your Honor.

THE COURT: Thank you.

Mr. Bates?

MR. BATES: No, Your Honor. No questions. Thank you.

THE COURT: All right.

Thank you.

We'll conclude the hearing for today and be in recess.

(Proceedings concluded.)